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No. 01-1271

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS, *et al.*,

Petitioners,

v.

TOWN OF LEXINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS REPLY TO RESPONDENTS BRIEF IN OPPOSITION

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ARGUMENT

The Appellants hereby reply to the Appellee's Brief in Opposition, as follows.

I. HECKLER'S VETO WAS CONTENT BASED AND NOT NEUTRAL.

The District Court found and the United States Court of Appeals for the First Circuit affirmed that the regulation banning the Appellant's crèche from the town of Lexington's Battle Green was motivated in response to citizens who opposed the display. "There is no question in the present case that the opposition to the crèche motivated the amendment to the regulation." Pet. App. (hereinafter, App.) at 55a-56a.[1] This fact is undisputed. It was not, as Respondents argue, that the town was merely reacting to a likelihood of damage to the Green. Rather, it was "opposition to the crèche" (speech) that motivated the regulation, having nothing to do with aesthetics. The record below amply supports the Appellant's position on this point. The Appellee's opposition has no support in the record.

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[1] The Magistrate, in the Report and Recommendations on Cross Motions for Summary Judgment, App. p. 27a stated "there was no evidence of an attempt to suppress the message of the crèche or that the message was treated differently than any other message which may have been deemed less controversial." App. p. 56a. The message of the crèche, however, is obvious: It is the depiction of the birth of Jesus Christ, a core belief of Christianity. The District Court found it was "opposition to the crèche" that motivated the amendment. Even if the town had no animus toward the crèche, selectmen reacted to the opposition of town residents who did. This amounted to a ratification of a heckler's veto.

Because it was a heckler's veto, it cannot be viewed as content neutral regulation. *Graynard* v. *City of Rockford*, 408 U.S. 104, 117 (1972); *Forsyth County Georgia* v. *National Socialist Movement*, 505 U.S. 123, 130-134 (1992) and cases cited in Pet. for Cert. pp. 10, 15.

II. THE RESPONDENTS CONTINUE TO RELY UPON THE POST HOC RATIONALIZATIONS CONTAINED IN THEIR POST COMPLAINT AFFIDAVITS. THE ASSERTIONS CONTAINED IN THOSE AFFIDAVITS CONTINUE TO BE INVOKED BY THE TOWN AS THE BASIS FOR THEIR REGULATION WITH NO SUPPORT IN THE RECORD.

The issue of whether the display of the crèche was aesthetically damaging or inconsistent with the Green's history was addressed by the Magistrate.

> Plaintiffs do, with justification, take exception to the fact that the defendants are now arguing that the presence of any unattended expressive structure on the Green is incompatible with its historic use and destroys its aesthetic value. See e.g. Enrich Aff. at ¶¶ 31-34; Kreiger Aff. at ¶¶ 6, 7. Since the crèche has been displayed on the Green for 80 years, it is difficult to give credence to the defendants' present description of the

> harm that is likely to occur if the display is allowed to continue.

App. at p. 60a.

The Magistrate's finding that the crèche would no longer be the sole unattended structure on the Green, and that the placement of additional unattended structures would be inconsistent with the aesthetic and historic usage is surmise and conjecture. The fact is Lexington Green is a robust public forum as acknowledged by the Respondents themselves. Res. Br. in Opp. p. 2(b). The Green is a traditional public forum. App. p. 7a.

Petitioners note that the very affidavits of town officials invoking concerns of aesthetic damage caused by prospective applicants were not viewed seriously by town officials. See Pet. p. 7 *fn* 5. Respondents themselves acknowledge in their Br. in Opp: "[t]he Board understood that some or all of these potential applications were not serious, and that the prospective applicants had no desire actually to erect structures on the Green." Br. in Opp. p. 6(4).

The rationalization offered by Respondents that "the Board realized that if it granted a permit for the crèche, it also would be required to permit these other displays on the Green." contradicts the acknowledgement that the "prospective" displays "were not serious" and that the prospective applicants, "had no desire actually to erect structures." *Id.* These contradictory conclusions dem-

onstrate the tenuous and fragile legitimacy of the regulation.

If prospective applicants approached the town with a proposal to erect a two and a half ton, 27 foot high, 27 foot wide Menorah with a permanent foundation, as was the case in *American Jewish Congress* v. *City of Beverly Hills*, 90 F. 3d 379 (9th Cir. 1996) or other huts and structures on the Green, an assessment could be made as to any likely physical damage to occur on a case by case basis, consistent with time, place and manner doctrines.

III. MISAPPLICATION OF THIS COURT'S CAPITOL SQUARE DECISION.

Analyzing this Court ruling in *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753, (1995) the First Circuit Court of Appeals concluded that a ban on all unattended structures in a traditional public forum would "pass constitutional muster." App. p. 11a. Respondents restate the lower court's ruling in this regard as follows: "Indeed, as a majority of this Court and various courts of appeals already recognized, a content-neutral ban on all unattended structures is an inherently reasonable time, place and manner restriction." Br. in Opp. p. 12. Petitioners addressed this issue in Pet. p. 13 *fn* 6. More needs to be said.

The Court of Appeals cites to three cases that are not at all clear as to their import. The Ninth

Circuit in *American Jewish Congress* v. *City of Beverly Hills*, 90 F. 3d 379, 384 (9th Cir. 1996) said "[t]he city council could ban all unattended private structures in its parks." *Id.* at 384. It then cited to Justice Souter's concurring opinion in Capitol Square stating, "Ohio could ban all unattended private displays in Capitol Square if it so desired." Petitioner's position is that Capitol Square was not a traditional public forum. Lexington Green is. The First Circuit then cited to Congregation *Lubavich* v. *City of Cincinnati*, 923 F. 2d 458, 460 (6th Cir. 1991). The Cincinnati case is informative but not on point. In Cincinnati the Sixth Circuit allowed the placement of a free standing Menorah and noted in *dicta* that a case "arguably" could be made that a ban on all displays might be permissible. Lastly, the First Circuit cited to *Lubavich Chabad House, Inc.* v. *City of Chicago*, 917 F. 2d 341, 347 (7th Cir. 1990) as standing for a similar proposition. The Chabad House case was not a public forum case. The Seventh Circuit case referred to designated public spaces at O'Hare International Airport. The purpose of the regulation was to prohibit obstructions. "The language of the regulation itself articulates the significant governmental interest involved — the interest in prohibiting obstructions to the use of the airport or interference with airport operations." *Id.* at 346. The case was decided on discriminatory grounds.

Interestingly, in one case cited by Respondents in their Br. in Opp. p. 12, *Wells* v. *City and County of Denver*, 257 F. 3d 1132, 1149, 1150 (10th Cir.

2001) the Tenth Circuit in Wells seemed to distance itself from the broad interpretation of Capitol Square given by the First Circuit. The Tenth Circuit saw the language in Capitol Square as "*dicta*" *Id.* It noted that "[t]he relevant language in Justice Scalia's majority opinion — joined, in pertinent part, by six other justices — hypothesized that an unattended display ban "might be" an example of a valid, time, place and manner restriction."

IV. ALTERNATIVE SITES TO DISPLAY THE CRÈCHE AND OFFERS TO ASSEMBLE AND DISASSEMBLE THE CRÈCHE ON THE GREEN DAILY AFTER EIGHT HOURS, FOR ALL PRACTICAL PURPOSES, MAKES SPEECH IMPRACTICAL.

The First Circuit ruled that the regulation did not "unduly restrict the Knight's free speech rights because they have adequate alternative avenues of communication available to them [citation] the Knights remain free to display the crèche, either during the course of an event on the Green or at any time on nearby private property." App. p. 12a (D).

The effect of the regulation accomplished its purpose: In 2000 and 2001, after an eighty-year period where the crèche was displayed on Lexington Green, the crèche did not appear. Not only did opponents of the crèche win, but town officials didn't have to deal with the issue of so called "competing structures". This was truly a sad and

frustrating day in the history of the First Amendment in Massachusetts. Advising the Knights to go elsewhere and exercise their rights, however, is not a proper grounds to ban expressive activity, for "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U.S. 147, 163 (193[illegible] Moreover, this Court has recognized that the specific place where a message is communicated may be important to the message and, consequently, of constitutional significance itself. *See City of Ladue* v. *Gilleo*, 512 U.S. 43, 56 (1994) (right to display expressive sign on residential property). Not only may the location be an essential part of the message sought to be conveyed, but it may also be essential to communicating with the intended audience. *See, Nationalist Movement* v. *City of Boston*, 12 F. Supp. 2d 182 (D. Mass. 1998).

V. THE NEED FOR A PER SE RULING FROM THIS COURT IS IMPERATIVE.

This case demonstrates why a per se ruling is so necessary from this Court. Petitioners have found very few cases, in their extensive review of case law, where private unattended structures are anything other than Christmas Holiday displays, nativity displays, or the display of Jewish Menorahs. While Respondents alluded to a series of proposed frivolous uses of the Lexington Green by opponents of the crèche, the Respondents' own

affidavits viewed most if not all of the request as unlikely to materialize.

The First Circuit, using the language of Capitol Square, invoked content neutrality to deal with the problem of the crèche, but the motive for the regulation, however nuanced, was clear as found by the Magistrate: "opposition to the crèche motivated the amendment to the regulations." *Supra.* This is not content neutrality. Other governmental entities by invoking this "content neutral" application of Capitol Square, combining it with other doctrines relating to regulation of speech and expressive activity in traditional public forums can now in a "content neutral" manner eliminate religious expression as was done here, as well as parades, processions, assemblies, displays, demonstrations, reenactments, vigils and services to name but a few.

CONCLUSION

The strictest of scrutiny must be applied to any governmental regulation of private speech and expressive activity in a traditional public forum.

Respectfully submitted,

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